No. 2718

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. V. WINTERMOTE, Trustee of the Estate of BLUMAUER LUMBER COMPANY, a corporation, Bankrupt, *Appellant.*

vs.

T. H. MACLAFFERTY, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

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ARGUMENT.

The facts in the above case differ somewhat from those in the case of *Keyes, Trustee v. Davie*, number 2717, but the questions of law are practically the same and the same arguments will be submitted,

except where additional authorities are cited in support of the change in facts.

The question involved in the second assignment of error will be discussed first, in order to make an easier comparison with appellant's brief.

Appellee herein was the general manager of the company, but owned no stock in the company, being nominally secretary because a change was never made after he gave up his stock. This case is, therefore, parallel with *In re Swain*, 194 Fed. 749, so far as the objection of being a stockholder and an officer of the company is concerned.

Appellee was virtually mill foremen and did some physical labor, working—when the emergency arose—as long as seventy-two hours straight. In fact, he was a master mechanic, and by virtue of these different kinds of work is entitled to a labor lien under the Washington lien statutes.

Graham v. *Gardner*, 45 Wash. 648.
In re Lawler, 110 Fed. 135.
Cors & Wegener v. *Ballard Iron Works*, 41 Wash. 380, 82 Pac. 713.
Gould v. *McCormick*, 75 Wash. 61.
Vincent v. *Snoqualmie Mill Co.*, 7 Wash. 566.

A master mechanic is entitled to a labor lien.

Sleeper v. *Goodwin*, 67 Wis. 590.

A manager of a mill and a foreman of a mill are entitled to liens for their labor.

Conlee Lbr. Co. v. *Ripon Lbr. & Mfg. Co.*, 29 N. W. 285.
Willamette F. & T. M. Co., v. *Remick*, 1 Or. 169.
Wetzel & T. Ry. Co. v. *Tennis Bros Co.*, 145 Fed. 458.

A superintendent is entitled to a lien.

Pendergast v. *Yandes*, 8 L. R. A. 849.
Stryker v. *Cassidy*, 76 N. Y. 50.

In the case of *Flagstaff Silver Mining Co. of Utah* v. *Cullins*, 104 U. S. 176, 26 L. Ed. 704, the United States Supreme Court was called on to construe and interpret the lien statute of Utah, which reads as follows: "Any person or persons who shall perform any work or labor upon any mine, or furnish material," etc. The court said, in describing the duties of Cullins:

> "He was the overseer and foreman of the body of miners who performed the manual labor upon the mine. He planned and personally superintended and directed the work with a view to develop the mine and make it a successful venture. * * * Their performance (duties) may well be called work and labor; they require the personal attention and supervision of the foreman and occasionally in an emergency it becomes necessary for him to

> assist with his own hands. Such duties cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under the control of the foreman, is nevertheless as really work and labor. Bodily toil as well as some skill and knowledge in directing the work is required for their successful performance."

Cullins had full authority to employ and discharge and procure miners and purchase supplies for working the mine. It was his duty to oversee and direct the work in the mine, to direct the shipping of ore, and generally to control the working and development of the mine.

How could two cases be more perfectly parallel? The statutes are similar, and the duties are so nearly alike that if the name MacLafferty were substituted for Cullins and Mill for Mine, one would think he was reading a description of the duties of appellee in this case.

The court, in answer to the claim that he was not a laborer, said: "Statutes, giving liens to laborers and mechanics for their work and labor, are to be liberally construed."

In the case of *Blessing vs. Blanchard,* (C. C. A. 9th Cir.) 223 Fed. 35, a superintendent and foreman of the repair department was held entitled to a labor lien, even under the National Bankruptcy

Act. MacLafferty was superintendent and foreman of the mill, besides being master mechanic.

From the cases above cited, indubitably it would seem that MacLafferty was performing labor in the operation of the mill, and that his services as master mechanic would certainly place him in the classification of the Washington statutes, even if literally and strictly construed.

Appellant cannot raise the question of the National Bankruptcy Act supplanting the State Statutes because that question was not considered in the District Court or before the Referee.

> *Lane & Co. vs. Maple Cottage Mills*, 226 Fed. 692.
> *Pine River Logging & Impr. Co. vs. U. A.*, 46 L. Ed. 1164, 186 U. S. 279.

The rules of equity govern questions of appeal and the above two cases hold that appellant is estopped from raising a question in the higher court that was not raised in the court below. This is a rule both in the Federal and in the State courts.

The cases cited in appellant's brief, with the exception of one, do not decide the question of section 64 B (4) governing labor claims where claimant is not within the classification of that section; rather, they decide the question that this section governs

and takes precedence over state statutes relative to time and amounts claimed by persons coming within the provisions of Section 64 B (4).

Under *In re Amoratis*, 178 Fed. 919, appellee's claim should be allowed.

It is respectfully submitted that the order of the court below should be affirmed.

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